

## **RULE-MAKING SUSPENSION UPDATE**

December 8, 2010

On Wednesday, Nov. 17, 2010, Gov. Chris Gregoire issued Executive Order 10-06, directing state agencies that report to her to suspend non-critical rule-making activities through the end of 2011. The order doesn't affect Ecology's other regulatory work, such as permitting, guidance, enforcement, water quality improvement plans, and policy development.

Ecology released an initial determination about what rules now in development are time-sensitive and should continue in the context of Gov. Gregoire's executive order. Many citizens, stakeholders and local and tribal governments weighed in with their thoughts on our initial decisions. In fact, 10 of the rule-makings we are proceeding with are under the exemption for rules that are beneficial to or requested by the regulated entities, local governments or small business that they affect.

Today I'm announcing Ecology's decisions about what moves ahead, what will be delayed through 2011, and what rules in process are "to be determined."

There's been some confusion about our "to be determined" list. These are rules that we're waiting on more information, local decisions, or legislation before deciding if they should proceed or be delayed. Each one has a specific reason why it makes sense to delay making a final decision.

As we've been going through this process and looking closely at each rule, it has highlighted for me how important rules are to effective government. Rules provide the specifics needed to implement state and federal laws. Those specifics often need to change to reflect new information - about science, federal laws and rules, and to fix implementation problems that arise with experience. We have heard strong support from business, government and the public for moving ahead on many of our rules. On the other hand, there are many rules whose timing we found to be "non-critical," and we will delay, per the Governor's directive to provide predictability and stability, and minimize the process workload on folks who would otherwise have to participate in the rule-making process.

I know that not everyone will agree with all of these decisions. In making them, I weighed the spirit and the letter of the Governor's directive, the different criteria for exemptions, input we've received, and our own sense of what is and isn't "critical" to move forward at this time. As we make further decisions in the coming weeks and months on the "to be determined" list of rules, we will notify stakeholders, the public and local and tribal governments accordingly.

Regards,



Ted Sturdevant, Director  
Washington Department of Ecology

### **CHANGES FROM THE INITIAL DETERMINATION**

The status of three rule-makings changed based on input received. Changes include:

- Lower Emission Vehicles (anticipated rule-making) – from To Be Determined to Continued
- Solid Waste Handling Standards (WAC 173-350) – from Delayed to To Be Determined
- Diesel Engine Idle Reduction (anticipated rule-making) – from Delayed to To Be Determined

### **DELAYED RULE-MAKING**

Work on the following list of rules will be delayed until January 2012.

<b>DELAYED RULE-MAKING</b>		
<b>Rule process</b>	<b>Purpose</b>	<b>Explanation</b>
<b>Model Toxics Control Act (MTCA) WAC 173-340</b>	The MTCA rule provides a framework for making cleanup decisions; periodic updates enable incorporating new science and new regulatory requirements.	The MTCA rule includes flexibility to make decisions on a case-by-case basis; Ecology expects more site specific decisions and increased demand for technical support. Stakeholder concerns on vapor intrusion addressed during rule-making discussions can be incorporated into guidance. Ecology anticipates resuming rule-making after the one year suspension.
<b>Mercury lights New rule</b>	Ecology would adopt rules to set fees to continue running the state's product stewardship program for mercury-containing light bulbs. The law requires those that produce these types of bulbs to fund a program to collect, transport and recycle mercury lights. The amount described in law covers start up costs but not continued expenses.	Ecology didn't anticipate beginning a rule process until late 2011. A delay until January 2012 could be accommodated.
<b>Reclaimed water WAC 173-219</b>	The rule-making addresses all aspects of reclaimed water, including commercial and industrial uses, land applications, direct recharge, wetland discharges, stream flow augmentation among others.	Ecology can use the delay to focus on developing guidance about reclaimed water that answers concerns raised by stakeholders. Reclaimed water facilities can continue to be permitted using existing authority given to Ecology and state Health.
<b>Samish River subbasin instream flow WAC 173-503A</b>	This rule amendment would establish for the Samish Basin in WRIA 3 instream flows, identify amounts of water available for future water rights processing and identify streams for closure.	Ecology has limited instream flow staff resources for rule-making.

## DELAYED RULE-MAKING

Rule process	Purpose	Explanation
<b>Dangerous waste regulations WAC 173-303</b>	Ecology needs to update the state's rules for dangerous waste, including both optional and required federal changes, as well as correcting language and conflicting requirements.	The benefit of these updates will be mostly felt by a small number of hazardous waste generators – primarily small universities or colleges. These stakeholders haven't asked Ecology to continue pursuing updates.
<b>Outdoor burning WAC 173-425</b>	This planned update would make administrative and process improvements related to burning in outdoor containers, as well as add definitions to make Washington's rules consistent with the EPA.	These regulatory changes can wait until 2012, but will delay improvements in rule clarity and streamlining that benefit those businesses and residents who may be subject to the regulations.
<b>Solid fuel burning devices WAC 173-433</b>	This expected rule process would update sections of the woodstove rule to further reduce emissions, align the rule with proposed 2011 legislation and incorporate EPA's planned 2011 rule revisions. This would help in Washington's efforts to improve air quality in "non-attainment" areas affected by pollution from woodstoves.	This process can wait until 2012, when it's clear what legislation passed and the EPA rule revisions are finalized. Delay beyond 2012 will affect the state's ability to address sources of pollution driving federal "non-attainment" area designations.

## RULE-MAKING THAT WILL CONTINUE

Ecology will continue work on the rules listed below. Each qualifies under a specific criterion in the [exemption guidelines](#). The relevant criteria:

- 3a - Required by federal or state law or required to maintain federally delegated or authorized programs;
- 3b - Required by court order;
- 3c - Necessary to manage budget shortfalls, maintain fund solvency, or for revenue generating activities;
- 3d - Necessary to protect public health, safety, and welfare or necessary to avoid an immediate threat to the state's natural resources; or
- 3e - Beneficial to or requested or supported by the regulated entities, local governments or small businesses that it affects.
- 5 – Agencies may continue to adopt rules that have been the subject of negotiated rule-making or pilot rule-making that involved substantial participation by interested parties before the development of the proposed rule. Agencies can also proceed to finalize permanent rule-making that has previously been covered by emergency rules.

Any rule Ecology moves forward will have or already has had the appropriate small business and local government consultations.

## RULE-MAKING THAT WILL CONTINUE

Rule process	Purpose	Exemption criteria
<b>Lower emission vehicles</b> <b>WAC 173-423</b>	Ecology anticipates making technical updates to its existing rule in 2011 to ensure consistency with California's vehicle manufacturer reporting requirements (clean car standards).	3a – Required by federal law. California is the only state allowed by federal law to have its own vehicle emissions standards program. Federal law requires states that opt into the California clean air standards to periodically update state rules to align with changes in the California program.
<b>Sediment Management Standards</b> <b>WAC 173-204</b>	Moving ahead with this rule update will resolve existing ambiguities over setting sediment cleanup levels that protect human health, fish and wildlife. Addressing the impact of bioaccumulative chemicals is an important step needed to restore and protect Puget Sound.	3d - Necessary to protect public health. Rule adoption would clarify requirements and provide direction for cleanup actions. This rule work has been requested to continue by local governments, Tribes and environmental groups. Resolving the confusion around cleanup of contaminated sediments appears to be a widely recognized priority. Ecology anticipates rule work will need to address several issues, including sediment background concentrations, fish consumption rates and differences between marine and freshwater environments. Ecology plans to file an updated CR-101 in early 2011.
<b>Underground storage tanks (UST)</b> <b>WAC 173-360</b>	USTs present a very real risk of groundwater and soil contamination. This rule update would bring Washington into compliance with new federal standards and make it easier for owners of UST systems to prevent leaks and other system failures that pollute.	3a – Necessary to maintain federally-delegated program and funding for the work. Federal grants (\$1.8 million) that cover the state's costs of the UST program require compliance with federal regulations and would be put at risk without this update.

## RULE-MAKING THAT WILL CONTINUE

Rule process	Purpose	Exemption criteria
<b>Motor vehicle air emissions inspection</b> <b>WAC 173-422</b>	The Legislature directed Ecology to expand the available pool of businesses that can test car emissions. This rule change would adjust the criteria so more businesses could contract with the state to do this work. The rule criteria need to be updated well ahead of the next contract window for emissions testing (July 2012) so businesses can prepare to qualify to offer this service.	3e – Small businesses would see their opportunity to do this work expand.
<b>Water quality standards</b> <b>WAC173-201A</b>	Portions of the surface water quality standards contain information that needs to be corrected or clarified. Continuing work on this rule amendment will make the rule easier to understand and more accurate. At least one permit and two water quality improvement processes are affected by incorrect information in the existing rule.	3e – Stakeholders have asked Ecology to continue work on this rule correction effort. One permittee has appealed its permit based on these errors, and has indicated the case could be resolved with these corrections.
<b>Columbia Basin Project (groundwater)</b> <b>WAC 508-14</b>	This would amend an existing rule to help provide better clarity around the amount of available groundwater for the Columbia Basin Project. This will provide certainty to water users who currently do not have the security of a water certificate.	3e – The rule amendment would encourage economic growth and generate revenue for businesses and local communities by helping provide reliable and sustainable water for users.
<b>Water rights rule amendment (Hillis)</b> <b>WAC 173-152</b>	Recent legislation directs Ecology to “aggressively pursue” new water supplies in the Columbia River basin. However, without this rule amendment, Ecology can’t prioritize water right decisions as the law directs.	3e – Rule adoption would provide more flexibility in getting water to pending water right applicants, supporting small business and economic growth.

## RULE-MAKING THAT WILL CONTINUE

Rule process	Purpose	Exemption criteria
<b>Certified Water Rights Examiner program</b> <b>New rule</b>	The 2010 Legislature passed a law to assist in the process of transitioning water right permits to final water right certificates through the use of contractors, who will be reimbursed for their work by those requesting certificates. Implementing this legislation, including a new fee to help cover program costs for testing and certifying contractors, requires Ecology to develop a rule. Moving ahead without establishing a fee structure to implement this certification program would cost state taxpayers more.	3e – Affected permittees, mainly cities, utilities and the agricultural community, supported the development of this position because it would increase Ecology’s efficiency.
<b>Brake pads</b> <b>New rule</b>	Recent legislation requires brake pad manufacturers to phase out certain toxic metals (including copper) from brake pads. Ecology plans to pursue a rule to establish a “proof of certification” mark for packaging; set up data collection regarding the amount of toxic metals in brake pads sold in Washington; and create an exemption process.	3e – Ecology is receiving letters from brake pad manufacturers urging the agency to continue rule-making so there are clear criteria for manufacturers to meet when the law takes effect in 2013.
<b>Criteria for Municipal solid waste landfill</b> <b>WAC 173-351</b>	Ecology needs to adopt new federal regulations into its rules for municipal landfills to ensure full federal approval of Ecology’s program. Regulated landfill owners requested Ecology pursue this rule-making to adopt the necessary federal changes.	3e – Stakeholders requested Ecology seek full federal delegation of the municipal solid waste landfill program from EPA. This rule-making will accomplish this request.

## RULE-MAKING THAT WILL CONTINUE

Rule process	Purpose	Exemption criteria
<b>Industrial air quality permit fees WAC 173-455</b>	This rule would adjust permit fees for sources that plan to construct or modify their existing operations to more fully cover the costs of the workload associated with these permits. Current costs are more than the fees collected by Ecology. Other streamlining improvements are also being proposed to simplify processes and associated application fees for businesses.	3c – Ecology has legislative approval to increase these fees. If fees aren't increased in order to fund permit work, there will be considerable delays in permitting approval.
<b>Dam Safety WAC 175-175</b>	The legislature directed Ecology to increase dam construction permit and inspection fees to help offset the actual cost of Ecology's work to administer the program. Rules are required for making any changes to a fee program.	3c – The additional permit and inspection fees would cover more costs of the program – 35 percent versus 26 percent today.

## RULE-MAKING THAT WILL CONTINUE (based on Nov. 17, 2010 decision)

Rule process	Purpose	Exemption criteria
<b>Greenhouse gases reporting WAC 173-441</b>	Changes to state law required Ecology to adopt rules on how regulated businesses will report greenhouse gas emissions. This will harmonize state reporting with federal reporting requirements.	3e -This rule eases the regulatory burden on those who must report emissions by closely aligning state and EPA requirements, and by starting the program in 2012.
<b>Air pollution sources WAC 173-400</b>	This rule amendment will bring state rules for regulating major air pollution sources in line with federal requirements so that Washington can maintain regulatory authority. Examples include amendments to resolve State Implementation Plan deficiencies as well as updates to comply with new federal greenhouse gas thresholds that go into effect January 2011.	3a - This rule must be updated to ensure that Washington will continue to maintain regulatory authority of industrial sources in the state. These amendments will also ensure that we are in compliance with our delegation agreement with EPA.

**RULE-MAKING THAT WILL CONTINUE (based on Nov. 17, 2010 decision)**

<b>Rule process</b>	<b>Purpose</b>	<b>Exemption criteria</b>
<b>Operating permit regulation WAC 173-401</b>	Ecology must update the state rule to include federal greenhouse gas thresholds before Jan. 2, 2011. Failure to make this deadline would force hundreds of businesses that emit greenhouse gases at 100 tons or more per year to obtain an air operating permit for their operations.	3e – Without this rule amendment in place by Jan. 2, 2011, hundreds of small greenhouse gas sources in Washington would be required to get a permit.
<b>Water Pollution Control Revolving Fund (emergency and permanent rule-making) WAC 173-98</b>	An emergency rule is necessary so that the new federal requirements could be implemented to distribute funds. These amendments will address provisions (e.g. green infrastructure or forgivable principal) in the new 2010 Clean Water State Revolving Fund federal appropriation, which affects how the agency can distribute funding to local jurisdictions for water pollution control projects.	3e –Without this rule, Ecology would not receive federal funds that are used to provide low interest loans for local government water quality projects including forgivable principal loans to financial hardship communities for water pollution control projects.
<b>Upper Kittitas groundwater WAC 173-539A</b>	<p>The purpose of this rule is to withdraw from appropriation all unappropriated groundwater within upper Kittitas County pending the completion of a groundwater study, with these exceptions:</p> <ul style="list-style-type: none"> <li>• Uses determined to be water budget neutral pursuant to this rule under WAC 173-539A-050; and</li> <li>• Uses of groundwater for a structure for which a building permit application vested prior to July 16, 2009.</li> </ul> <p>When adopted this final rule will replace the emergency rule.</p>	5 – Previously covered by emergency rules and work is allowed to continue on these types of rules.



**RULE-MAKING THAT WILL CONTINUE (based on Nov. 17, 2010 decision)**

<b>Rule process</b>	<b>Purpose</b>	<b>Exemption criteria</b>
<b>Children's Safe Products Act pilot rule WAC 173-334</b>	This rule will establish a reporting schedule for chemicals of high concern in children's products.	5 – This is a pilot rule-making and work is allowed to continue on these types of rules.

**TO BE DETERMINED**

Some of Ecology's rule-making work is at a point where action or decisions from others is necessary to help determine the appropriate path forward. Others include local governments, planning or technical advisory groups, Tribes and the Legislature. Ecology will make decisions on each of these in the future.

**TO BE DETERMINED**

<b>Rule process</b>	<b>Purpose</b>	<b>Explanation</b>
<b>Diesel engine idle reduction New rule</b>	This is an anticipated rule that would provide significant reductions in heavy duty diesel emissions for public fleets while reducing engine maintenance and operating costs.	New, more stringent federal air quality standards are expected in 2011, which could lead to increased non-attainment designations. Depending on the final standards, this rule is one potential tool to help communities reduce emissions and avoid "non-attainment" status. Ecology would consult local governments on any such rule-making.
<b>Solid waste handling standards WAC 173-350</b>	In order to expand organics recycling and address management of problem solid wastes, certain provisions of current state solid waste rules may need amending.	Ecology will consult with local governments, businesses and interested parties on options for addressing concerns with existing composting operations, and any needed updates to the existing rule.

TO BE DETERMINED		
Rule process	Purpose	Explanation
<b>Spokane County Shoreline Master Program (SMP)</b> <b>WAC 173-26-070</b>	<p>If a local government fails to adopt an updated SMP according to the schedule in statute, Ecology is required to adopt an SMP for that local government. This is accomplished by adoption of a rule. Spokane County has adopted an updated SMP. However, the document fails to meet requirements of the SMP guidelines. Ecology rule-making is the alternative if we cannot come to agreement with the county on a mutually acceptable SMP.</p>	<p>Proceeding with rule-making is being held while Ecology works with Spokane County toward a mutually-acceptable SMP. This is our preferred route. If we cannot reach agreement with the county, Ecology will need to complete this rule to adopt an adequate updated SMP for Spokane County.</p>
<b>Elwha-Dungeness instream flow rule (WRIA 18)</b> <b>New rule: WAC 175-518</b>	<p>Implement the locally-adopted watershed plan by setting instream flows, mitigating new development, metering new water uses and developing new sources of water to meet community needs.</p>	<p>Consensus building continues among stakeholders for developing pathways that include tailored mitigation, new water supply projects as well as a draft rule. Ecology has worked closely with the watershed committee on the rule process for several years. Although our goal is local consensus, Ecology is still responsible for moving forward with rule-making if consensus is not reached.</p>
<b>Grays-Elochoman, Cowlitz instream flow rules (WRIAs 25, 26)</b> <b>New rules: WAC 175-525, WAC 175-526</b>	<p>Implement the locally-adopted watershed plans by setting instream flows, establishing water reserves for future use, and closing certain sensitive areas to further withdrawals.</p>	<p>The watershed planning group is revisiting elements of its plan, and Ecology is working closely with this team to ultimately revise the draft rules. New rule recommendations could come from the group in late spring 2011.</p>
<b>Shellfish/Shoreline Management Act</b> <b>WAC 173-18</b> <b>WAC 173-20</b> <b>WAC 173-22</b> <b>WAC 173-26</b> <b>WAC 173-27</b>	<p>The three basic topics addressed in this rule update are summarized below.</p>	<p>The comment period just closed on 11/23 for these proposed rule amendments. We are considering the submitted comments in determining the appropriate route forward.</p>

TO BE DETERMINED		
Rule process	Purpose	Explanation
<ul style="list-style-type: none"> <li><b>Geoduck/Shellfish</b></li> </ul>	This rule-making addresses intertidal geoduck aquaculture siting and operations through local Shoreline Master Programs. It will provide critical information to Puget Sound communities undergoing shoreline program updates now.	
<ul style="list-style-type: none"> <li><b>Limited amendments</b></li> </ul>	The rule amendment would correct existing outdated language that significantly restricts the ability of cities and counties to make minor adjustments in their shoreline regulations.	
<ul style="list-style-type: none"> <li><b>“housekeeping” amendments</b></li> </ul>	These proposed housekeeping updates would make corrections and provide clarification in the existing rule.	
<b>Wastewater discharge permit fees WAC 173-224</b>	State law requires Ecology to collect fees from wastewater and stormwater discharge permit holders to cover the permit program costs. These fees currently fall short. Ecology plans to propose a rule to increase the fees for those permit types that are currently underfunded.	The costs of administering the permit program aren’t in line with the fees collected. This increase would only apply to permit categories not currently covering the cost of administering the permits and is contingent upon legislative budget approval in the 2011 session.
<b>Water service contracts</b>	Ecology is proposing legislation in 2011 to provide the option of using cost recovery contracts for work to develop new Columbia River Basin water supplies. Ecology would likely pursue rule-making in late 2011 or early 2012 to establish the cost recovery methodology.	This would provide reliable and sustainable water supplies for communities and users in Eastern Washington. Several groups that advise Ecology on water issues have given their support. This is contingent upon legislative approval.